Jonbil, Inc. *and* Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC. Cases 11–CA–16707, 11–CA–16899, and 11–CA–16760, and 11–RC–6102

September 29, 2000

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On January 21, 1997, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Union filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this decision and to adopt the recommended Order[3] as modified.

The judge concluded that, regardless of the results of the election, the Respondent's unfair labor practices warranted issuance of a remedial bargaining order based on proof that the Union had obtained valid authorization cards from a majority of unit employees. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). We would normally at least consider issuing a bargaining order in these circumstances. However, given the long and unjustified delay of the case here at the Board, we recognize that such an order would likely be unenforceable. See generally *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1171 (D.C. Cir. 1996), and *Charlotte Amphitheater Corp. v. NLRB*, 83 F.3d 1074, 1078 (D.C. Cir. 1996). Accordingly, rather than engender further litigation and delay over the propriety of a bargaining order, we believe that employee rights would be better served by proceeding directly to a second election.

Although we will not impose a *Gissel* remedy in lieu of directing a second election in this case, we do find that an additional remedy is warranted in order to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices, and to ensure that a fair election can be held. Specifically, we shall order the Respondent to supply to the Union, on a request made within 1 year of the date of this Decision and Order, the names and addresses of all current unit employees. The Board's delay in acting in this case, although unfortunate, was no more the fault of the Union or the employees who were denied a fair opportunity to choose whether they desire union representation than it was of the Respondent. Our Order will afford the Union "an opportunity to participate in restoration and reassurance of employee rights by engaging in further organizational efforts, if it so chooses, in an atmosphere free of further restraint and coercion." *Cooper Hand Tools*, 328 NLRB 145 (1999), citing *United Dairy Farmers Cooperative Assn.,* 242 NLRB 1026, 1029 (1979), enfd. in relevant part 633 F.2d 1954 (3d Cir. 1980).[4]

AMENDED CONCLUSION OF LAW

Substitute the following for the judge's Conclusion of Law 13

"13. On or about September 14, Respondent, acting through Supervisors John Reese and Calvin Mosely,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge found that on or about September 14, Supervisors John Reese and Calvin Mosely threatened employees including Raymond Toone with loss of jobs if employees selected the Union to represent them. We correct the judge's inadvertent failure to include Calvin Mosely's unlawful conduct in his Conclusions of Law.

[3] We shall also modify the judge's recommended Order to include provisions that are in accord with our decision in *Indian Hills Health Care Center*, 321 NLRB 144 (1996), as modified in *Excel Container, Inc.*, 325 NLRB 17 (1997).

[4] Member Liebman believes that additional remedial measures are necessary to dissipate, as much as possible, the lingering atmosphere of fear created by the Respondent's pervasive unlawful conduct and to ensure that employees will be able to exercise a free choice in a second election. Specifically, she would also order the Respondent (1) during the time the notice is posted, to convene the unit employees during working time and permit a Board agent, in the presence of a responsible management official of the Respondent, to read the notice to the employees, and (2) to grant the Union and its representatives reasonable access to its bulletin boards and all places where notices to employees are customarily posted. From the beginning of the campaign, the Respondent kept up a virtual drumbeat of threats of plant closure and loss of jobs, including a threat made by the Respondent's president on the eve of the election. Member Liebman believes that the reading of the notice, as well as the access remedy, are necessary to provide employees with reassurance that they can learn the benefits of representation by the Union free from such a campaign of pervasive and serious threats. See Aqua Cool, 332 NLRB No. 7, slip op. at 3, fn. 8 (2000); (Member Liebman, dissenting in part) Blockbuster Pavilion, 331 NLRB No. 165 (2000); Audubon Regional Medical Center, 331 NLRB No. 42, slip op. at 5–6 (2000); Regal Recycling, Inc., 329 NLRB 355, 357 fn. 15 (1999) (Member Liebman, dissenting in part); Wallace International Puerto Rico, 328 NLRB 29, 30 (1999).

In declining to grant a bargaining order, Member Hurtgen also relies on the fact that Vice President Moore and Supervisors C. Mosely and McCluster, who were responsible for a number of the unfair labor practices, are no longer employed by the Respondent, and that there has been a 44 percent turnover of employees (154 of 352 employees) between the time of the events at issue here, more than 4 years ago, and the end of the hearing in this case on July 11, 1996. Although such evidence may not be dispositive, it is clearly a relevant factor in determining whether a bargaining order should issue.

threatened employees with loss of jobs if they selected the Union to represent them, and Respondent thereby violated Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, Jonbil, Inc., Chase City, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening plant closure if employees choose to exercise their rights protected by the Act.

(b) Interrogating employees, soliciting grievances from employees, and expressly or impliedly promising to remedy those grievances in order to discourage employees from selecting the Union to represent them.

(c) Threatening employees with loss of benefits if they select the Union to represent them.

(d) Threatening employees with the inevitability of strikes and the futility of employees selecting the Union to represent them.

(e) Threatening employees with loss of jobs if they select the Union to represent them.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Supply the Union, on its request made within 1 year of the date of this Decision and Order, with the full names and addresses of its current unit employees.

(b) Within 14 days after service by the Region, post at its Chase City, Virginia facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 17, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten plant closure if employees choose to exercise their rights protected by the Act.

WE WILL NOT interrogate employees, solicit grievances from employees, and expressly or impliedly promise to remedy those grievances in order to discourage employees from selecting the Union to represent them.

WE WILL NOT threaten employees with loss of benefits if they select the Union to represent them.

WE WILL NOT threaten employees with the inevitability of strikes and the futility of employees selecting the Union to represent them.

WE WILL NOT threaten employees with loss of jobs if they select the Union to represent them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL supply the Union, on its request made within 1 year of the date of the Decision and Order, with the full names and addresses of our current unit employees.

JONBIL, INC.

Michael W. Jeannette, Esq., for the General Counsel.
Townsell G. Marshall Jr., Esq. and *Robin E. Shea, Esq*. *(Constangy, Brooks & Smith),* for the Respondent.
Michael Okun, Esq. and *John Harkavy, Esq. (Patterson, Harkavy, & Lawrence),* for the Charging Party.

[5] If this order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Boydton, Virginia, on May 4–6 and July 9–11, 1996. In this proceeding, counsel for the General Counsel and the Charging Party seek a bargaining order remedy for alleged violations of Section 8(a)(1) and (3) of the National Labor Relations Act during the Charging Party Union's organizing campaign at Respondent's Chase City, Virginia facility.

The Union filed a petition for an election on July 24, 1995, in Case 11–RC–6102, seeking to represent Respondent's production and maintenance employees. An election was conducted on September 15, with 134 voting for union representation and 133 against. Challenged ballots were determinative of the results. Following the election, on September 21, the Union filed timely objections to conduct affecting the results of the election. On November 21, a report on objections and challenged ballots, order directing hearing, and order consolidating cases issued wherein six challenges were ruled on. The remaining 12 challenges were set for hearing along with the objections and alleged unfair labor practices.

During the trial of the cases, the parties stipulated to or withdrew all of the remaining challenges except one. The remaining challenge of Sebert Kyle is no longer determinative of the results of the election, and in view of the result reached need not be addressed here. Pursuant to the agreement of the parties, there were 10 additional eligible voters. Those 10 ballots were counted on September 6, 1996, and all were against union representation, with the final tally therefore being 134 for and 143 against union representation.

Respondent admits in its answer to the consolidated complaint, and based on the record I find that Jonbil, Inc. (Respondent) is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act. Respondent also admits the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denies having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On or about September 15, 1996, counsel for the General Counsel, the Charging Party Union, and Respondent filed timely briefs which have been duly considered.

On the entire record in this case, and from my observation of the witnesses, I make the following

FINDINGS OF FACT

A. Background

Respondent manufactures blue jeans and denim pants at its facility in Chase City, Virginia. This facility consists of two buildings, commonly referred to as the "bottom" plant wherein the cutting, stitching, and sewing processes are performed and the "top" plant wherein the administrative, shipping, receiving, and washing processes are performed.

Until his death in December 1992, W. J. Bank owned all of the shares of Jonbil. In October 1993, Herbert Winkler, now president of Jonbil, and Thomas Smith, now chief financial officer, purchased the company from Bank's estate. At that time, and until the summer of 1995, Jonbil had facilities in Chase City, Virginia; Danville, Virginia; and Henderson, North Carolina.

During the first year of operation under Winkler and Smith, the Company had $25 million in sales, but a net loss before taxes of $800,000. During the Christmas of 1994, garments that Jonbil had manufactured for J.C. Penney Co. did not sell well. Penneys' canceled its contracts with Jonbil, leaving Respondent with approximately $1 million in inventory.

1995 was worse yet. Work slowed, and employees were temporarily drawing unemployment compensation. The employees at the Danville and Henderson facilities were working 1 week on and 1 week off. During 1995, Respondent was forced to accept orders for cutting work to keep the employees working, even though it was not nearly as profitable as manufacturing an entire garment. Respondent entered an indefinite contract with Calvin Klein for the manufacture of designer jeans, but Klein canceled the contract at the end of 1995. For 1995, Respondent suffered a loss before taxes of $1.27 million. As of the time of the hearing, Respondent was suffering a $300,000 loss for 1996.

In the midst of this economic uncertainty, in mid-July 1995, the Union began its efforts to organize the employees of Jonbil at its Chase City facility. In August 1995, Respondent closed the Danville, Virginia facility. In January 1996, it closed the Henderson, North Carolina facility. Only the Chase City facility remains open.

B. July 17: Thomas Smith's Speech to Employees

On July 14, Thomas Smith, Respondent's executive vice president and chief financial officer, first learned of the Union's efforts to organize Respondent's employees. On July 17, he met with and addressed employees about the Union's campaign.

Employee Diana Hawley testified that on July 18, she and about 25 to 30 other employees attended a meeting with Smith, Human Resources Director Jack Albertson, and Supervisor Barbara McCluster, in which Smith stated he would do everything in his power to keep the Union out. According to Hawley, Smith told employees "he would not have to keep the plant open if the Union was to get in."

Smith testified that he began to formulate remarks for employees right after he learned of the union campaign. Smith testified credibly that he did not deviate from a text which he prepared for these meetings with employees and which was introduced by Respondent. The scripted speech contains no such statement by Smith. The script shows that during the meetings with employees, Smith spoke about the economic condition of the Respondent, including its significant losses since he and Winkler had purchased the company.

Smith admits he specifically read from the text of his speech the following: "*WE CAN'T AFFORD THE EXPENSE AND DISTRACTIONS OF A UNION CAMPAIGN. THE EXTRA COST COULD PUSH US OVER THE EDGE. . . . WE DON'T NEED A UNION TO COME BETWEEN US AT THIS CRITICAL TIME*! [Emphasis in original.]" Smith admitted that by being in all capital letters, it meant he said this not just once, but he reiter-

ated to employees. Smith's speech also includes the following: "AND LET MAKE IT CLEAR THAT WE WILL DO EVERYTHING LEGAL AND PROPER TO HELP YOU FIGHT THIS UNION ATTEMPT WHICH COULD HURT THIS COMPANY AT A VERY CRITICAL TIME IN WHICH WE ARE FIGHTING TO SURVIVE AND CONTINUE TO PROVIDE AMERICAN JOBS."

Counsel for the General Counsel admits Smith's statements to employees regarding the economic situation of the Company, while "questionable as to their timing," are lawful. Counsel for the General Counsel asserts, however, that these statements by Smith quoted above constitute threats of plant closure should the employees select the Union to represent them, and thereby violate Section 8(a)(1) of the Act. *AutoZone*, 315 NLRB 115, 127–128 (1994). See *Be-Lo Stores*, 318 NLRB 1 (1995); *Fieldcrest Cannon, Inc.,* 318 NLRB 470 (1995).

As Respondent argues, the Board and the courts have held that statements about plant closing are not unlawful when they are reasonable predictions based on economic factors beyond the control of the employer. See *Action Mining, Inc./Sanner Energies, Inc.,* 318 NLRB 652 (1995), which has certain similarities to the instant case in that it involves an employer in a depressed industry who made statements to employees indicating that unionization could have dire consequences for the company. The Board found that because of the financial context of the statements and the employer's willingness to share detailed information about the company's condition, the employer's statements were lawful predictions rather than unlawful threats. Likewise, the Board found it was not unlawful for the coowner to tell employees the company might lose customers even without a strike if the union came in where such statements are predicated on factors beyond Respondent's control.

Respondent argues that the reasoning of the Board in *Action Mining* should be applied in the instant case. Like the employer in *Action Mining*, Jonbil is in an industry that has fallen on difficult times. The decline of the U.S. apparel industry as it faces off-shore foreign competition is well known. Respondent argues that where, as here, the employer's economic condition is genuinely precarious, such statements are lawful.

I agree with Respondent that *Action Mining* demonstrates the Board recognizes that comments by an employer during a union campaign about the possibility of the business closing must be viewed in context in determining whether the statements are illegal. The Board and the courts have repeatedly held, however, that in order to be lawful, such comments must be reasonable predictions and must be based on circumstances beyond the employer's control.

Applying this standard to the instant case, I find that Respondent stepped over the line by linking the possibility of plant closure with circumstances within Respondent's own control. I agree with counsel for the General Counsel that by telling employees the cost of fighting the Union's campaign could itself push the Respondent "over the edge," Smith conveyed to employees that their mere exercise of Section 7 rights might itself cause Respondent to close the plant. Smith then emphasized his point by telling employees that Respondent would "fight this Union attempt which could hurt this Company at a very critical time." Smith's statements did not reflect reasonable predictions of the economic consequences of unionization beyond his control. With regard to the union campaign, Respondent had several choices—all of which were within its own control.

Respondent could choose to recognize and bargain with the Union if it demonstrated majority status, thereby saving money otherwise spent on an antiunion campaign. Or Respondent could choose to attempt negotiate a contract with the Union that maintains the status quo pending Respondent making a profit. Instead, Smith made it clear that Respondent chose to fight the Union, and that choice alone could result in Respondent closing the plant. Therefore, by continuing to exercise Section 7 rights, employees were running the risk of losing their jobs. I find that Smith's remarks, phrased as they were, threatened plant closure if employees chose to exercise their rights protected by the Act, and Respondent thereby violated Section 8(a)(1) of the Act.

C. July 20: Jack Albertson's Speech to Employees

Diana Hawley testified that she attended a meeting of employees on July 20 with Human Resources Director Jack Albertson and Supervisor Barbara McCluster. Hawley testified that Albertson spoke to employees about how the Company was in the "red" and that "if we [the employees need] to talk that he had an extension 233 and that we could talk to him at any time with this extension." According to Hawley, this is the first time she learned of such an "open-door" policy of Albertson.

Counsel for the General Counsel asserts that Albertson's comments to Hawley about calling or meeting with him if employees have questions in essence created a heretofore unknown "open door" policy, which is a benefit for employees in violation of Section 8(a)(1) of the Act.

Regarding the alleged "open-door policy," Albertson testified credibly he told employees to come by his office, or call him, if there were any questions and he would get them an answer. By either Hawley's version or Albertson's, the evidence is woefully insufficient to establish that Jonbil implemented a new "open-door policy" during the campaign. Obviously, all Albertson was offering to do was be available to employees if they had questions about the Union, which was completely within the Company's 8(c) rights.

Hawley testified Albertson stated during this same speech that "Smith would not have to keep the plant open if the Union" was selected by the employees. Albertson denied making this statement. I credit Hawley insofar as she testified Albertson stated Respondent would not "have" to keep the plant open. Counsel for the General Counsel argues that Albertson's statement "violates the very heart of Section 8(a)(1) of the Act." I disagree.

Albertson's remark about the plant remaining open must be placed in its proper context in order to be properly judged. Respondent had lost considerable amounts of money since Winkler and Smith purchased the business. The Union, however, was campaigning with claims that Respondent had made a considerable profit and could afford a wage increase for employees. By Hawley's own version, Albertson did not threaten, or even predict, that employees would lose their jobs if the Union won the election. What Albertson did say was simply that Smith would not *have* to keep the plant open if the Union won the election, an accurate statement of the law. In the Union's campaign, as is more fully discussed below, employees had been lead to believe

that merely electing the Union meant that Respondent was required to give employees some improvements in wages, hours, or working conditions. In the context of this case, therefore, Albertson's statement properly informs employees that they should not mistakenly equate selection of the Union with perpetual job security.

D. July 20: Restriction on Visitation

Corine Hayes, a first-shift employee at Jonbil, testified that on July 20, 1995, she came to the plant at 7:30 p.m., during second shift, to visit her nephew, who was having his meal break at a picnic table outdoors. Hayes' testimony about this incident is so confused that it is difficult to determine what actually happened. In her initial description, Hayes testified that while she was at the picnic table with her nephew, Hayes showed the others various union materials. A security guard whom she did not know then came to the table and told her that visitors were not allowed. Hayes testified that 2 weeks earlier, presumably before the union campaign, she had been allowed to visit her son, who also worked second shift. The same security guard was involved both times. Hayes asserted that in all, she had come back to the plant to visit other employees approximately "a dozen" times, and July 20 was the only time she was ever asked to leave.

During further testimony, however, Hayes corrected herself and stated that on July 20, she never got out of the car she was driving when the guard instructed her to leave. On recross examination, Hayes acknowledged that she sat in a parked car and her nephew came over to her. Obviously, therefore, she did not show union materials to other employees at the picnic table. Hayes also stated that she had informed counsel for the General Counsel that her affidavit given to the Board during the investigation of this case was incorrect in various details.

Later in the trial, counsel for the General Counsel stated on the record that he had indeed been informed by Hayes of the inaccuracies in her affidavit, and that he inadvertently overlooked this in asking the question about being at the table when she spoke to her nephew. Counsel for the General Counsel stated that he wanted to bring his error to the attention of the court having read the transcripts.

Counsel for the General Counsel maintains that Hayes' unrebutted testimony should be credited and a finding made that Respondent violated Section 8(a)(1) of the Act when it restricted its off-duty employees from visiting its premises during working employees' lunchbreaks in order to discourage its employees from participating in the union campaign.

I cannot agree with counsel that even Hayes' unrebutted testimony supports finding a violation. Hayes "unrebutted" testimony offers two such varied versions that it is difficult to determine what really happened. Her willingness to offer the first version under oath in response to counsel for the General Counsel's questions leaves me with some doubt about the reliability of her testimony. Moreover, on cross-examination, Hayes admitted that she had not told the security guard why she was at the plant on July 20. Further, the guard did not say anything to indicate that he knew why Hayes was there. Hayes also admitted that she visited the same nephew approximately 2 weeks *after* July 20—while the campaign was still ongoing—and that no one asked her to leave on this occasion. Finally, on questioning by me, she testified that on July 20, she did not know whether the security guard had any idea that she was engaged in union activity. Based on the record herein, I cannot agree with the position advanced by counsel for the General Counsel.

There is absolutely no evidence that on July 20, the security guard had even the slightest idea Hayes was distributing union materials, or that he asked her to leave in order to disrupt that activity. What is clear is that Respondent did not institute some new rule on learning of union activity among employees, for as Hayes herself testified, she visited the same nephew approximately 2 weeks *after* July 20—while the campaign was still ongoing and no one asked her to leave on this occasion. Hayes' own testimony is less than clear about what happened on July 20, and in the end we are left with nothing but speculation about what might have motivated the guard to ask Hayes to leave on that day. I find that counsel for the General Counsel has failed to carry its burden of proof, and I shall therefore dismiss that allegation from the complaint.

E. July 27: Albertson's Meeting with Employees

Catherine Martin, who had worked for Respondent approximately 4 years and quit just a few weeks before she testified, stated that on or about July 27, she attended a meeting with about 30 other employees. Human Resources Director Albertson, Moore, and Supervisor McCluster were all present. Martin testified that Albertson spoke to employees without the benefit of any papers in front of him. According to Martin, Albertson told employees that once the Union came into the plant, any employee who did not make 5 percent over production would be terminated. Martin also testified Albertson told employees that if the Union did get in, and if the "Union said strike then we would have to strike." According to Martin, she informed Albertson that if the Union said they had to strike, employees did not have to strike, but Albertson replied that they did.

Pearl Andrews testified that she too attended this meeting. According to Andrews, she heard Albertson state that the Union would have employees fired who are unable to make 5 percent over production.

Albertson admits making statements to employees in this meeting somewhat similar to, yet substantively different from, the comments attributed to him by Martin and Andrews. Albertson testified credibly that he informed employees about a union contract at another employer where all employees who did not make 100-percent production could be terminated, and denied telling employees that they could he discharged if they did not make 5 percent above production requirements. Albertson further testified credibly that in response to an employee question about employees going out on strike, Albertson replied that employees would be expected to honor the strike. Albertson credibly denied telling employees that they would *have* to honor a strike called by the Union.

Counsel for the General Counsel asserts that Albertson's comment to employees violates Section 8(a)(1) of the Act "for it coerces employees into believing that the Union's winning of the election could cause them to be later terminated from their jobs." Counsel for the General Counsel goes on to argue that even assuming Albertson's comments about another company and union are factually correct, the statements by Albertson nevertheless

violate the Act because they "give Respondent's employees a reasonable impression that such a provision would automatically be included in their contract and thus not making a certain level of production, whatever that level decided upon, would cause employees to be terminated." I reject each of these arguments.

Albertson's statements regarding contract provisions at another employer were in fact nothing more than an accurate description of the give-and-take during bargaining, the accuracy of which counsel for the General Counsel does not dispute. Even assuming Albertson implied that such terms could be or even would be included in a contract at Jonbil, it has long been recognized that an employer is free to point out to employees that the bargaining process can and sometimes does result in employees having more strict work rules than before. See, e.g., *Custom Window Extrusions, Inc.*, 314 NLRB 850 (1994).

F. July 31: Addition of Supervisor

Employees Pearl Andrews, Gwen Canada, and Catherine Martin testified that on July 31, Smith announced over the intercom at the plant that a unit of employees would henceforth consist of 20 to 25 employees, which would result in there being more supervisors per employees. As a result in this reduction in the number of employees per supervisor, Rosa Mosely became Andrews', Canada's, and Martin's supervisor. Canada testified that having more supervisors per employee could allow employees more access to supervisors and therefore quicker response in resolving production problems, thereby increasing production and allowing employees to make more money. Martin, however, testified that it made no difference to her work whatsoever.

Counsel for the General Counsel contends Respondent failed to explain why it chose to implement "this benefit" to employees about 2 weeks after the union campaign began. According to counsel for the General Counsel, the addition of Mosely as supervisor, and the resulting reduction in the number of employees per supervisor, constituted an unlawful benefit to employees in violation of Section 8(a)(1) of the Act. I cannot agree.

There is no dispute that on July 31, Respondent announced that it he would be adding supervisors to help employees with their productivity, something it referred to as "the JOBS Program." Respondent's unrebutted and altogether credible evidence was that in January 1994, long before any union campaign, Winkler and Smith hired consultants to find ways to improve employee productivity. In early 1995, still 3-1/2 months before any campaign began, they hired a new group of consultants for the same purpose. This second group of consultants made a series of recommendations that were submitted to Winkler and Smith at the end of June 1995, approximately 2 weeks before the campaign began. The Fourth of July shutdown followed, and after the shutdown, it took the Company approximately 2-1/2 weeks to implement the recommendations. The record is utterly convincing that although the JOBS program was announced to employees after the campaign began, this announcement was simply the culmination of a process that began long before the campaign. I shall therefore dismiss this allegation from the complaint.

G. August 8: Supervisor Barbara Stenbridge

Angela Ward testified without contradiction that around August 8, she had a conversation with her supervisor, Barbara Stenbridge, in which Stenbridge asked Ward why she was supporting the Union. Ward testified Stenbridge then asked what kind of problems Ward had, and "if [there was] anybody else she could talk to." Stenbridge then told Ward "to make a list of the problems [she] had, and [Stenbridge] would go to Tom Smith with the list." Finally, Stenbridge told Ward that she "was scared for her job."

Ward's unrebutted testimony establishes a clear violation of Section 8(a)(1) of the Act, including both unlawful interrogation and solicitation of grievances with an implied promise to remedy those grievances. *Performance Friction Corp.*, 319 NLRB 859 (1995). Even though Ward was a known supporter of the Union, this does not preclude her from being unlawfully interrogated. The proper test is one of the totality of the circumstances, which in this case establishes that the interrogation occurred in the context of Stenbridge also soliciting grievances. In this context, Ward's status as a known union adherent is immaterial. See *Rossmore House,* 269 NLRB 1176, 1177 (1984). I find that Respondent interrogated Ward, solicited grievances from Ward, and expressly or impliedly promised to remedy those grievances in violation of Section 8(a)(1) of the Act.

H. August 18: Smith Meeting with Employees

On August 18, employees were paid in part by check and the other part by cash. Respondent admits it utilized this payment approach in order to demonstrate to employees the amount of money they would be paying for dues if they joined the Union. Employees were required to sign a receipt to get the cash portion. When employees saw what Respondent had done, some became upset, and a commotion developed on the work floor. Smith was then called to the work floor. Conversation between Smith and employees began on the work floor, and was then moved to the cafeteria.

Current employees Victoria Brooks, April Mason, Dequta McBee, and Pearl Andrews, and former employees Margaret Johnson and Rufus Marable all testified about the events that occurred after Smith arrived on the work floor. Brooks stated that as Smith talked, employees became very loud. According to Brooks, she asked Smith why employees could not get more money, and Smith replied, "with or without a Union [the employees] were not getting [any] more money."

April Mason asserted that during the meeting, Smith told employees that "before he let the Union come in, he would close the factory." At the same time, Mason asserted Smith stated that Respondent would bargain with the Union "from scratch."

Margaret Johnson testified that after she had refused to sign the paper to get her money in cash, she asked Smith in the meeting what employees were going to receive if they work there 30 years. According to her, Smith replied, "Nothing." Johnson recalled a conversation between employees and Smith during this meeting wherein Smith said that the "Union was no good" and "if the Union came into Jonbil, we would have to start from scratch." According to Johnson, Smith went on to say, "We would have nothing and he said that if the Union came in he wouldn't be able to afford their prices and he would close the doors."

Dequta McBee testified that employees were upset and crying. According to McBee, Smith responded to a question about the

Union saying, we are "not promising you anything, because we have nothing to give you." Then another question was asked of Smith, if "the Union comes in, will you sit down and bargain with them?" According to McBee, Smith replied, "No, we don't have the—if the Union comes in we do not have to sit down and bargain with them. We do not have to give you all anything. All we have to do is bargain in good faith."

Rufus Marable testified that Smith informed employees that "we wouldn't be able to have a Union in [Jonbil]" and "If we do, it would be just a matter of time until [the plant] would close."

Pearl Andrews testified that she was sitting at her machine when the conversation began between Smith and employees about their paychecks. Andrews testified that as the conversation was still ongoing on the plant floor, her supervisor, Barbara McCluster, came over and said, "I can tell you this much. If the Union comes in here, Jonbil will close in two to three years."

Counsel for the General Counsel acknowledges Smith's alleged comments to employees vary from witness to witness. Counsel for the General Counsel notes, however, these are statements from employees who testified against their interest and contain the central theme of futility in selecting the Union as the employees' representative in violation of Section 8(a)(1) of the Act. Counsel for the General Counsel argues that the comments by Smith regarding how the Respondent was not going to pay employees more money with or without a union, and how it was going to bargain from scratch or start from scratch, all indicate to employees that it is futile to select the Union as their collective-bargaining representative. In addition, he argues Smith's comments that the plant would close if the employees selected the Union, attributed to him by Mason, Johnson, and Marable, constitute a threat of plant closure.

The record establishes that when employees found out they were being paid partly by check and were being required to sign a receipt to get the remainder of their salary in cash, many became upset. Victoria Brooks testified that employees became very loud. Dequta McBee testified that employees were upset and crying. It is not surprising, therefore, that different witnesses recall Smith's alleged statements differently. Particularly where employees are upset, loud and crying, few recall what was actually said. Some recall what they think was said. Others recall what they understood was meant by what was said. Having observed these witnesses, some are more credible and more accurate than others. I have no doubt, for example, that when Brooks asked Smith why employees could not get more money, Smith replied something very much like, "with or without a Union [the employees] were not getting [any] more money," or words to that effect. Similarly, I credit Margaret Johnson that when she asked Smith what employees were going to receive if they work 30 years, Smith replied, "Nothing," or similar words. Such statements obviously do not encourage employees to choose the Union to represent them, but the employer is not obligated to do so.

The statements described above are sufficiently ambiguous that they may impart a lawful meaning, as well as an unlawful one. While one can conclude that Smith threatened futility in selecting the Union, it is just as reasonable—and in the context of this case more likely—Smith was simply conveying to employees that Respondent was stretched to its economic limit, and it was not going to give employees more simply because they selected the Union to represent them. Employees are fully capable of analyzing and weighing such remarks in the context of a heated campaign such as that conducted by both the Union and Respondent.

I credit April Mason only to the extent she testified Smith stated that Respondent would bargain with the Union "from scratch," testimony corroborated by Margaret Johnson. I do not credit Mason's claim Smith told employees that "before he [would] let the Union come in, he would close the factory." That alleged statement is internally inconsistent with his statement that Respondent would bargain—albeit from scratch—and is not supported by a single other witness. I have no doubt whatever that Smith did say something about the possibility—or even the probability—of the plant closing. This was testified to by Johnson and by Marable. According to Marable, Smith stated to employees "we wouldn't be able to have a Union . . . [and] if we do, it would be just a matter of time until [the plant] would close." Marable's use of the phrase "it would just be a matter of time" strongly suggests and tends to corroborate Smith that remarks about closing were made in the context of economic conditions. This becomes especially clear from Johnson's testimony, in which she expressly remembered that remarks Smith may have made about closing were in the context of his statement that "if the Union came in, he wouldn't be able to afford their prices." I therefore conclude Smith did not threaten plant closure as retaliation for employees selecting the Union. Rather, Smith warned employees that the Union could cause economic consequences which might result in the plant closing.

The internal inconsistency in Dequta McBee's testimony is obvious. According to her, when she asked Smith, if "the Union [does] comes in, will you sit down and bargain with them?", Smith replied, "No, we don't have the—if the Union come in we do not have to sit down and bargain with them." She then went on to testify Smith stated, "We do not have to give you all anything. All we have to do is bargain in good faith." Obviously Smith did not say both that Respondent did not have to sit down and bargain with the Union—and that it did have to bargain in good faith. It is apparent from the testimony of both McBee and Smith that Smith told employees Respondent did not have to agree to any union demands ("we do not have to give you all anything") but that Respondent did have to sit down and bargain with the Union in good faith. Obviously such a statement is an absolutely accurate description of the law and does not violate the Act.

Based on the above, I find the evidence inadequate to conclude that during his remarks to employees on August 18, Smith threatened employees with plant closure or that it would be futile to select the Union as their collective-bargaining representative. I shall therefore dismiss those allegations from the complaint.

Supervisor Barbara McCluster, on the other hand, did not testify at the hearing. The testimony of employee Andrews stands unrebutted and, as described, constitutes a clear and unequivocal threat of plant closure. Accordingly, I find that by McCluster's statement, Respondent violated Section 8(a)(1) of the Act. See *Roadway Packaging System,* 302 NLRB 961, 963 (1991).

I. August 18: Rosa Mosely

Employees Victoria Brooks and Gwen Canada, and former employee Catherine Martin, testified that Rosa Mosely was at the August 18 meeting between Smith and employees concerning paychecks, described above. All testified that after Smith met with employees, Mosely spoke to a few employees separately. According to Brooks, Mosely said that if employees do not leave the Union alone, the Company would close the plant. Canada testified very similarly to Brooks, noting that Mosely said, "if you don't listen to Mr. Smith, they would close the plant down if the Union [came in]." Martin corroborates both Brooks and Canada, testifying Mosely stated that "we had better listen to the owners . . . because if we didn't, that they would close Jonbil down."

I credit Brooks, Canada, and Martin over the bare denials of Mosely. All three corroborate one another with enough detail yet just enough difference in their description that I have no doubt whatever they are telling the truth—and accurately so. I find that Mosely threatened plant closure if employees selected the Union to represent them, and Respondent thereby violated Section 8(a)(1) of the Act.

J. August 22: Laundry Manager John Reese

Employee Angela Ward testified that around August 22, she met with Laundry Manager John Reese in his office. Ward testified during their conversation, Reese told her his uncle lived in a city that had unions, and they were always starting riots. The two of them talked about how some of the employees at Jonbil were no longer talking to each other, and Reese said "if you think it's bad now, wait until the Union comes in."

According to Ward, Reese continued talking and informed Ward about bargaining with the Union. Reese stated that if the Respondent gave the employees more money, then "[Jonbil] could take one of our holidays like Christmas . . . away from us."

Reese testified at the hearing, but was not asked by Respondent's counsel about any conversation he had with Ward. Ward's testimony stands uncontroverted. I find nothing unlawful, however, in Reese's remarks. Reese's remarks accurately describe some of the possible consequences of unionization. The comment about interpersonal employee relationships worsening if the Union were voted in was obviously a mere personal opinion about how employees would behave between themselves, and did not in any way suggest specific action or reaction by Respondent itself. The comment about employees possibly losing a holiday in return for a pay raise simply represents an accurate description of the possible give-and-take of the bargaining process. There is no indication Reese threatened any retaliation by Respondent if employees selected the Union to represent them. Accordingly, I shall dismiss complaint allegations related to this conversation.

K. August 22: Fred Moore Meeting

Diana Hawley testified that on August 22, she attended a group meeting of half of her department at which Vice President of Manufacturing Fred Moore spoke to employees. According to Hawley, Moore told employees they were like family and "the Union would change our attitudes and that we [employees] wouldn't [be] able to talk to the supervisors."

Moore testified that he spoke from a prepared speech and did not deviate from his prepared text. Moore's speech, however, notes that one of the changes that would occur should the Union be voted in is that his "personal relationship with each and every one of [of the employees] would change and [his] ability to work with [them] would be restricted." The speech also states that no longer "could we work side by side, but with a union steward between us."

Moore's own speech clearly informs a reasonable person that selecting the Union will cause employees to lose their ability to discuss work-related matters with management, something which the Board has held on numerous occassions constitutes a threat of loss of benefits in violation of Section 8(a)(1) of the Act.

L. Late August: Rosa Mosely

Catherine Martin testified that near the end of August, she had a conversation, one of several, with Supervisor Rosa Mosely at Martin's machine. Mosely asked Martin what she thought the Union could do for her. According to Martin, during this conversation Mosely told Martin that if the Union got in, and it said strike, the employees would have to strike, and management would not have to bargain or negotiate with the Union. I credit Martin that Mosely also stated that if the Union was voted in, all the benefits including vacation pay, holiday pay, and insurance would be stopped right then, and that the employees would not get those benefits back until a contract was negotiated.

I credit Martin's very detailed testimony over Mosely's bare denials. Further I find that Mosely's comments constitute threats of loss of benefits if employees were to select the Union as their bargaining representative in violation of Section 8(a)(1) of the Act. See *Baddour, Inc.,* 303 NLRB 275 (1991); *Be-Lo*, supra; *Fieldcrest Cannon,* supra.

M. Late August to Mid-September: Rosa Mosely

Sherry Hailey testified that that she had about 10 conversations with her supervisor, Rosa Mosely, about the Union from late August until election day in mid-September. According to Hailey, Mosely would come up to Hailey at her machine and start a conversation, which would soon get around to the Union and the Company. Hailey testified credibly Mosely told her: "Tom Smith would close the plant if the Union [came] in. [Smith] wasn't going to let a Union tell him how to run this Company and he would make us go on strike because he would not negotiate with the Union, he wouldn't negotiate at all and the Union would make us strike."

Hailey is one of several employees who testified credibly to remarks made to them about the Union by Supervisor Rosa Mosely, who apparently took it on herself to conduct her own vigorous antiunion campaign after hearing remarks and speeches of top-level management. The credible evidence shows that Mosely in her own remarks to employees repeatedly threatened plant closure, the inevitability of strikes, and the futility of employees selecting the Union to represent them, and Respondent thereby violated Section 8(a)(1) of the Act. See *Be-Lo*, supra; *Fieldcrest Cannon*, supra.

N. September 5: Calvin Mosely

Orin Osborne, a 10-year employee, testified that on September 5, he had a conversation with Shipping Manager Calvin Mosely

on the receiving floor. Mosely told him Hamco, another plant in town, was closing. Osborne testified credibly Mosely then stated that Jonbil would close down by Christmas if the Union got in. Mosely denied making the statement attributed to him by Osborne, but I found Osborne more credible with regard to this conversation.

Based on Osborne's credible testimony, I find Mosely's statement that Jonbil would close by Christmas if the Union were selected by employees constitutes a clear threat of plant closure in violation of Section 8(a)(1) of the Act. See *Fieldcrest Cannon*, supra.

O. September 7: The Debate

On September 7, UNITE Representative David Sailer and Respondent's human resources director Jack Albertson engaged in an open debate in front of most of the employees. Employees Brogdon, Hayes, and Hawley, as well as former employee Martin, all testified that during the debate, Albertson asked the employees to raise their hand if they were for the Union. It is undisputed that a number of employees present did in fact raise their hands in response to something Albertson said.

Counsel for the General Counsel argues that Albertson asking employees to raise their hands during the debate constituted interrogation and polling in violation of Section 8(a)(1) of the Act. I find, however, that this is not what occurred. In reaching this conclusion, I am well aware that both current and former employees, as well as the union representative who was at the event, all testified that Albertson asked employees to raise their hands if they supported the Union. They provided little context, however, in which this is supposed to have occurred. Moreover, from the perspective of the employees, it may well have appeared as if this is what happened. Albertson's explanation how this incident developed is particularly credible in the context of this incident.

The debate was held in a large warehouse with 40-foot ceilings. There was only one microphone for Albertson, Sailer, and the Reverend Bill Luck, a local minister who acted as the moderator, to share. Neither party, by the way, called Luck to testify concerning Albertson's alleged polling of employees. For the most part, union supporters were not a bashful, shy group. Nor was this some purely intellectual debate. Rather this was a spirited, highly partisan, and somewhat rachous event—with overtones of a pep rally from each side.

Albertson testified credibly that he did not literally ask employees to raise their hands if they were for the Union, but rather there was a point during the debate where employees asked questions. Employees in the audience did not have a microphone, and when a question was addressed to him, Albertson repeated the question before trying to answer it. During this question-and-answer period, a woman asked why the Company did not recognize the Union when it was obvious that so many employees supported it. She then challenged Albertson to ask for a show of hands in support of the Union. Albertson testified credibly he responded that he did not care to know how many employees were in favor of the Union. At that point, someone else in the audience asked Albertson, "What don't you care about?" Albertson replied, "She wanted me . . . to ask by a show of hands how many people were here for the Union." At that point, a group of employees raised their hands.

I agree with Respondent that Albertson's testimony was at least partially supported by a "Freudian slip" by Orin Osborne, who appears to have caught himself in midthought. When asked about Albertson's alleged interrogation or polling, Osborne testified, "*It started off was a lady asked*—Jack Albertson asked how many was for the Union."

It is highly unlikely that an experienced management representative with Albertson's background would openly interrogate an entire group of employees about their union support in the presence of a union organizer. More importantly, I credit Albertson entirely regarding the way in which this alleged polling of employees occurred at the debate. Accordingly, I find that at this debate, Respondent did not unlawfully poll or interrogate employees, and I shall dismiss that allegation from the complaint.

P. September 11–12: Fred Moore Meetings

Employee Dequta McBee testified that on or about September 11, she attended a meeting held by Vice President of Manufacturing Fred Moore with about 12 other employees, most of who were relatively new employees. McBee agrees with Moore that he read remarks from a prepared text. McBee testified Moore said that "if the Union came in, that all our holidays would be taken from us, like Christmas, Thanksgiving, Labor Day. That they would have to wipe the slate clean, we will start all over. And there would be less holidays than we have now." According to McBee, Moore further stated that if the Union wins, then it will make employees go out on strike, and if they went out on strike, the employees would be out of a job—Jonbil would simply hire more employees to work in their place so that they would all be out of a job.

McBee testified that around September 12, a few days before the election, Moore conducted yet another meeting with about 12 employees and Supervisor Barbara McCluster. In this meeting, Moore allegedly told employees that the Respondent "would just have to bargain in good faith. They didn't have to negotiate with the Union because no law stated that they had to negotiate with the Union." Moore's alleged comments are then placed in real context when McBee continued, "Which I didn't know whether that was true or not, but from the meetings I had attended . . . it was expressed to me that a company do have to give us something. You know. They have to give us something if the Union did come in."

According to Michelle Brogdon, she attended the meeting, and Moore simply stated Jonbil "couldn't afford to give [employees] what [they] wanted, that they were in financial difficulties." Brogdon stated that Moore had some papers from which he appeared to occasionally read.

Moore credibly testified that he read from a prepared text. According to Moore, he informed employees at these meetings that if the Union was voted in, Respondent and Union would have to sit down and start bargaining for things such as "holidays and vacations and all of that." Moore candidly admitted that he reminded the employees of Respondent's undeniable financial plight and that "if the Union won the vote and went on strike, [Respondent] couldn't survive no more than maybe two to three months."

Counsel for the General Counsel asserts that Moore's statements to employees constitute threats of plant closure, of loss of

benefits, futility, and the inevitability of strikes in violation of Section 8(a)(1) of the Act. I disagree. Moore credibly denied telling employees that any specific benefits would be taken from them, and admits telling employees that all benefits would have to be negotiated. Moore admitted he informed employees that the parties would "start over" and start to bargain for their benefits, holidays and vacations.

When considering credibility of counsel for the General Counsel's witnesses and Respondent's witnesses, counsel for the General Counsel contends that its witnesses' testimony is unlikely to be false inasmuch as Gwen Andrews, Victoria Brooks, Michelle Brogdon, Gwen Canada, Sherry Hailey, Diana Hawley, Corine Hayes, Dequta McBee, Penny Staten, and Angela Ward were employed by the Respondent at the time of their testimony. Thus, these witnesses testified adversely to their own interest and, the argument goes, should be credited over the testimony of Respondent's witnesses. In making credibility resolutions, I am fully aware that many employee witnesses can be said to have testified against their own interest. Indeed, I find few instances in which I have any reason to believe these witnesses knowingly or intentionally misconstrued any of the facts. In other words, I have no reason to believe that they themselves do not honestly believe their own testimony. Whether they are accurate, however, is another matter altogether.

McBee's testimony represents a particularly good example. McBee's testimony clearly shows that, while perhaps in good faith, she misunderstood what was actually said to her by focusing on only a portion of that. Counsel for the General Counsel has tried to build on that by lifting specific phrases out of context. This is especially evident in the portion of McBee's testimony in which she says Moore told employees that Respondent "would just have to bargain in good faith" but at the same time "didn't have to negotiate with the Union."

Based on a composite of the credible portions of the testimony of McBee and Brogdon, and the wholly credible testimony of Moore, I find that Moore told employees if the Union were voted in, all benefits would be subject to negotiation; that from the company's standpoint, negotiations would "start all over;" that Respondent would not be required to give in to the Union's demands (something different from what employees had been led to believe in union meetings); and that Respondent would only have to bargain in good faith. I also find Moore told employees that if they went out on strike, they would be permanently replaced. The Board has repeatedly found that none of these specific comments, without more, violates the Act. All of these statements represent an accurate statement of the law and/or reasonable description of the give-and-take process of negotiations.

Finally, Moore reminded the employees of Respondent's undeniable financial plight, and opined that "if the Union won the vote and went on strike, [Respondent] couldn't survive no more than maybe two to three months." As noted above, the Board and the courts have repeatedly held that such comments must be viewed in their entire context. Given Respondent's undeniably bleak financial condition, I find nothing inappropriate in Moors telling employees that Respondent could not survive a strike for more than 2 or 3 months.

The alleged threats of the futility of bargaining were really statements based on the accurate and poor economic condition of the Company. The Union had distributed literature implying that it could get Jonbil employees substantial increases in wages and benefits. It is not unlawful for an employer to describe the give-and-take of the bargaining process, to inform employees that the employer does not have to agree to anything that the union proposes in bargaining, or to inform employees that it may not be able to afford what the union proposes. See, e.g., *C & D Charter Power Systems,* 318 NLRB 798 (1995); *Custom Window Extrusions,* 314 NLRB 850 (1994); *Plated Plastic Industries,* 311 NLRB 638 (1993).

Q. September 13: Albertson Meeting

Employee Michelle Brogdon testified that on or about September 13, she attended a meeting held by Human Resources Director Albertson with about 10 other employees. According to Brogdon, Albertson stated at the meeting that Jonbil would not have to bargain even if the Union is selected to represent the employees. According to Brogdon, Albertson asked the employees to "go home and think about the Union and if [they] had any questions to call him."

Albertson testified at length at the hearing, and credibly denied ever telling employees that Respondent would not have to bargain with the Union even if elected by employees.

Counsel for the General Counsel tries time and again to claim that Respondent told employees that selecting the Union would be futile in violation of Section 8(a)(1) of the Act, but the credible evidence simply does not support such a conclusion. As with employee Dequta McBee, whose testimony is described at length in the preceding section, the record shows that employee witnesses called by counsel for the General Counsel often misunderstood what was actually said to them by focusing on only a portion of that, and counsel for the General Counsel has tried to build on that by lifting specific phrases out of context. I am simply not confident that Brogdon is any more credible than McBee in reporting what Albertson actually said to employees. To many of these employees called by counsel for the General Counsel, saying that Respondent "would just have to bargain in good faith" is the same thing as saying that Respondent "didn't have to negotiate with the Union." This is particularly true where, as here, employees were led by the Union to believe that if they elected it, Respondent would have to give them something. I credit Albertson that he never told employees Respondent would not have to bargain with the Union even if elected, and I shall dismiss that allegation from the complaint.

R. September 13: Rosa Mosely

Penny Staten testified that during the union campaign, Supervisor Rosa Mosely would come up to Staten from time to time and initiate conversations, often about the Union. On or about September 13, Staten was at her sewing area when she had a one-on-one conversation with Mosely. Staten testified credibly that on this day, Mosely told Staten, "before Mr. Winkler would let a Union come into Jonbil he would close the doors." Mosely denied making this statement to Staten, just as she denied making similar statements to other employees. I credit Staten, and I find that Mosely violated Section 8(a)(1) of the Act by threatening employees with plant closure if they selected the Union to represent them.

S. September 14: Winkler Speech

On September 14, Corporate President and CEO Herbert Winkler addressed employees one last time on the day before the Board-conducted election. It is undisputed that certain known avid union supporters were not invited to this meeting and were asked to leave.

Employee Dequta McBee testified Winkler told employees at the meeting that the union representative was a "s.o.b." and that "the Union members were damn fools." McBee also asserted that Winkler stated before he would let the Union come in, he would close the plant because he could make more money as an accountant than working at Jonbil. According to McBee, Winkler also told employees he had a letter from Calvin Klein stating that if the Union won at Jonbil, it would lose the contract with Calvin Klein. McBee testified that she was aware the Union had received a letter from employees who produce garments for Calvin Klein and the letter stated how those workers supported Jonbil workers in their efforts to organize Jonbil.

Employee Raymond Toone testified about the way in which certain employees were escorted out of the meeting because "they [were] for the Union." According to Toone, Winkler then started out by saying he was the "s.o.b. that the people wanting the Union [were] talking about." Toone testified Winkler told employees he was not willing to negotiate with the workers because he preferred to close the plant down than negotiate anything with the employees.

Winkler credibly denied threatening plant closure as claimed by McBee and stating a refusal to negotiate as claimed by Toone. Winkler testified credibly that on this occasion, he read a scripted speech to employees word-for-word as previously written. Winkler testified credibly that he scripted this speech in so much detail that carats were even inserted in the text to remind him where to take pauses. Winkler rehearsed the speech for 2 days before he actually delivered it. I credit Winkler that his remarks to employees on this occasion came entirely from the scripted speech.

It is unnecessary to quote the speech at length. Certain passages in the speech, however, do deserve specific attention. After Winkler informed employees about the undeniable dire financial situation Respondent was in, he then read to employees the following:

> Tomorrow's decision could affect everyone who depends on your paycheck and most of the people in this town. Why? Because Jonbil is in trouble, big trouble. . . Jonbil is in big trouble, and, in my opinion, what *could put this company under* is the division and infighting and yes, even the possible strike that this union could bring to Chase City. . . . [Emphasis in original.]

Later in the speech Winkler discussed how an economic strike at the plant could result should he not give in to "unreasonable" Union demands. Winkler stated that Respondent could "try to survive by operating . . . with replacements." Winkler then went on to say, "And I am concerned about those employees who would find it difficult to find another job if a union strike puts Jonbil out of business."

It is clear that Winkler dwelt at length on the possibility of Respondent going out of business. As I have noted above, the Board and the Courts have held that statements about plant closing are not unlawful when they are reasonable predictions based on economic factors beyond the control of the employer. I find, however, that Winkler repeatedly crossed that line and threatened plant closure based on circumstances very much within Respondent's own control in order to frighten employees to vote against the Union. My analysis begins with the portion of Winkler's speech in which he stated, "what *could put this company under* is the division and infighting . . . that this union could bring." Winkler is in fact predicating the possibility of the plant closing based on nothing more than employees selecting the Union to represent them, i.e., employees exercising their Section 7 rights protected by the Act. The fact that he almost immediately couples this with a "possible strike," does not alter the fact that with these words he is predicating possible plant closure with nothing more than employees selecting the Union.

It is apparent from the context of the speech that Winkler also links possible plant closure with strikes, but I find he does not always do so in the context of circumstances beyond Respondent's control. Clearly, Winkler opines that "what *could put this company under* is . . . even the possible strike that this union could bring . . . ." Later Winkler told employees, "giv[ing] in to unreasonable union demands then in my opinion this company will go under—because we cannot afford those increased costs." There is nothing objective, however, to predicate the view that the Union would necessarily make unreasonable economic demands. If Respondent was in the poor financial condition it claimed, and was willing to document this for the Union in negotiations, the Union might obviously ask for less than they might otherwise want, or even give concessions. However, Respondent never mentioned this scenario to employees for obvious reasons. Rather, Winkler simply offered an unfounded threat of closure predicated upon undefined and unfounded beliefs.

Further, part of Winkler's effort to instill in employees the fear of Respondent closing also involved an intentional misconstruction and misinterpretation of a letter received from Calvin Klein, one of Respondent's customers. Winkler stated to employees that he had received a letter from Calvin Klein informing Jonbil that Klein would withdraw its business from Respondent should the Union win the election. Winkler informed employees that the "union will get Calvin Klein to stop giving us business," should the employees elect the Union to represent them. However, the letter in question fails to substantiate Winkler's description. Rather, the letter sets forth that the unionized employees who sew Calvin Klein clothes at another plant "have some control over who else gets Calvin Klein contracts" and so those employees will oppose any company that treats its workers unfairly. Nowhere does the letter state or even imply that Klein would take business elsewhere if Respondent's employees became unionized. Winkler exaggerated the statements in the letter when he spoke to his employees in order to suit one purpose—sway the outcome of the election scheduled for the next day by using fear of the possibility of Respondent going out of business. I find that Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of jobs and plant closure should they select the Union as their representative.

T. September 14–15: Laundry Manager John Reese

Raymond Toone worked for Respondent approximately 4 years until he quit in early 1996. Toone testified that on September 14 or 15, he was cleaning up in the pressing area when laundry manager Reese came in and told Toone to come into the washroom. Toone testified credibly Reese then told him that he needed Toone to "think about the way [he] was going to vote in the election. Because [Reese] didn't want me to lose my job and that [Reese] didn't want to lose his job." Reese then told Toone that he needed to try and get some other employees "to vote, you know along with me." Toone was told that Calvin Mosely wanted to speak to him, so Toone left.

Calvin Mosely met with Toone and told Toone, "we need some Company support in the election." Toone testified that while he wanted to vote for the Union, he voted for the Company because he "was scared I wouldn't have no job to come back to, so I voted for the Company."

Angela Ward testified that Reese also spoke to her very briefly on election day. Ward testified credibly, "right before [the employees] went to vote, Reese came by, and he said we better pray. I said pray for what, Johnny, and he said we better pray for our job."

I find that Reese violated Section 8(a)(1) of the Act by threatening Toone with loss of his job should the Union win the election. Further, it is not unreasonable to conclude Reese and Calvin Mosely were working together in approaching Toone, for Reese instructed Toone to see Mosely. Consequently, even though Mosely only told Toone that Respondent needed some support in the election, I find that these comments tended to ratify or enforce the threat uttered by Reese himself, and I therefore find calling Toone to Mosely's office for this purpose also served to interfere with Toone's Section 7 rights in violation of Section 8(a)(1) of the Act.

Ward's credible testimony establishes that Reese also violated Section 8(a)(1) of the Act by threatening loss of jobs. See *Be-Lo,* supra; *Fieldcrest Cannon*, supra; *Heritage Nursing Homes, Inc.,* 269 NLRB 230, 232 (1984). Such comments are especially coercive given the fact that it was uttered on the day of the election just as Ward was preparing to vote.

U. September 15: Refusal to let Employees Leave Property

Hailey, Martin, and Staten testified that on the day of the Board-conducted election, they were not allowed to leave company premises and return later to vote. Hailey, who wore a union T-shirt while at work on election day, testified that she was not feeling well and so she punched out before 3 p.m. and was going to go sit in her car until it was time to go vote. Hailey told Supervisor Rosa Mosely what she planned on doing. Mosely instructed Hailey not to go outside until she talked to Moore. When Mosely returned from talking to Moore, Mosely told Hailey that she could not go outside, and if she did, then she would not be allowed to come back in and vote. Thus, Hailey stayed in the snack bar until it was time to vote, at 4:10 that afternoon.

Martin testified that around 2:45 p.m., she and Staten were told to clock out. They decided to leave the plant, and come back later to vote at the appointed time. Mosely told them that rather than leave, the employees should punch out and go to the cafeteria and sit until time to vote, which they did. Staten's testimony concerning this event corroborates Martin.

Mosely and Moore testified Moore simply told Mosely to ask the employees if they would mind waiting in the cafeteria until their voting time. Mosely claims that is all she did. Mosely denied employees were required to wait in the cafeteria.

I credit the testimony of Hailey, Staten, and Martin regarding this incident. Counsel for the General Counsel, however, cites no authority to support this as a violation of the Act, and I fail to see how requiring the three employees to stay on Respondent's premises for approximately 1 hour until it was time to vote interfered with the employees' Section 7 rights. Accordingly, I shall dismiss that allegation from the complaint.

V. Mid-September: Reduction in Hours of Catherine Martin and Penny Staten

Catherine Martin worked for Respondent for over 4 years, until she quit a few weeks before she testified. Penny Staten has worked for the Respondent for 5 years, and continues to do so. At the time relevant to this case, Martin and Staten each worked under the supervision of Rosa Mosely, where they operated single needle machines, sewing labels onto the outside of garments. Most of Martin's sewing was on "Long Haul" jeans, which is Jonbil's own brand.

Martin and Staten testified that prior to the union campaign, neither would be sent home early if there was sufficient work for them to sew elsewhere, in which case supervisors would assign them work in other departments. This testimony is really not disputed. In fact Plant Manger Ricky Wilson and Supervisor Pat Dodson agree Martin and Staten were sent to other departments, including Dodson's, notwithstanding that Martin and Staten did not care to work in Dodson's area. Martin had in the past "turned jeans," stayed pockets, and sewed pleats. Staten had stayed pockets, sewed pleats, and sewed darts.

Both Martin and Staten were open and active supporters of the Union. Both distributed prounion leaflets in Respondent's parking lot. Martin wore prounion stickers to work, while Staten wore a union T-shirt to work.

Martin and Staten testified that beginning about the week before the September 15 election, their hours decreased as they were sent home by their supervisor when work was slow, rather than being assigned to help in other departments as had been the practice in the past. Both Martin and Staten asserted that on days they were sent home early, recently hired employees, including Seamans and Langford, continued sewing Calvin Klein labels on pants, which they could have performed. Staten testified that she had been told a few months before the election by Barbara McCluster, her supervisor until late July, and Rosa Mosely, for whom she worked at the time of the election, that single needle operators were not to be sent home early because there was other work to be done.

General Counsel's exhibits indicate that Martin worked 11.25 hours the week ending September 9, which did not included time off for Labor day. The 3 weeks prior to that, Martin worked 17.75, 25, and 26.75 hours, respectively. The three week period after the week ending September 9, Martin worked 36, 11.25, and 34.50, respectively.

Using the same documents for Staten, the evidence indicates that the week ending September 2, Staten worked 23 hours. The average of the 4 weeks prior to September 2 show that Staten worked an average of 29.75 hours. The 4-week period after September 2, Staten worked an average of 29.50 hours.

Both Martin and Staten were openly active for the Union during the campaign and both were the recipients of threats of various types in violation of Section 8(a)(1) of the Act. Moreover, according to counsel for the General Counsel's argument, both women had their hours "substantially reduced," which in essence was a layoff for a day or two, within 2 weeks of the election. Counsel for the General Counsel thus argues that a prima facie case has been established that Martin and Staten were discriminated against in violation of Section 8(a)(1) and (3) of the Act. For the following reasons, I reject this argument.

In short, Staten's and Martin's claims were not supported by the record. The evidence shows that Seamans was not hired until October 24, 1995, more than a month after the election. Langford was hired the day after Seamans was hired. Thus, the record shows clearly that Seamans and Langford were not doing work Staten and Martin could have done during the period of their alleged reduction in working hours. Seamans and Langford were not yet even employees of Jonbil.

Further, Respondent's payroll records shed serious doubt on whether Staten or Martin suffered any reduction in work hours during the election period because of lack of work. A study of Staten's time records from August 1 through September 30, 1995, suggest that she worked *more* hours on average during the election period than she did during the overall 2-month period. Her average weekly hours for the election period were 31.0, while her average weekly hours for August and September were only 28.3.

A study of Martin's time records for the same periods showed that her *best* week (36 hours worked) was the week of September 11, the week of the election. Although the week before and the week after were lower, the week after the election (September 18, 1995), Martin was absent 2 full days and worked only a half hour on a third day because of her own personal needs. Judy Sheffield, engineering coordinator who works with payroll, testified credibly that she reviewed Martin's time schedule and noted that Martin left early from work with work available on September 19, and she was absent from work on September 20 and 21, thereby reducing the number of hours she could have worked.

The position advanced by counsel for the General Counsel that recently hired employees were allowed to continue working while Martin and Staten were sent home is not supported by the record. However, even if it were, disparate treatment is not established. Implied, if not expressed within counsel for the General Counsel's argument is the assertion that Martin and Staten should have been retained in place of less senior employees. Yet there is no evidence that at any time, junior employees were sent home temporarily from their regular jobs in order to make room for more senior employees, whether it be Martin and Staten, or any other employee. Rather, the record simply shows that Martin and Staten were kept working when there was extra work available.

The argument that Martin and Staten should have been kept working rather than other employees is founded on circuitous reasoning—an implied but unstated argument that Respondent should be required to afford departmental seniority. Further, contrary to the argument advanced by counsel for the General Counsel, the evidence is not at all clear that Martin and Staten were in essence laid off for a day or two at approximately the time of the election. For these reasons, I find that counsel for the General Counsel has failed to establish any disparate treatment of Martin and Staten, and I shall dismiss those allegations from the complaint.

W. October 19: Failure to Reassign Orin Osborne

Orin Osborne worked for the Respondent for about 10 years. Osborne was a material handler for most of his employment with Jonbil. On October 19, Osborne was transferred to the laundry, where he worked until he was laid off in early November.

Counsel for the General Counsel maintains that as of October 19, Osborne should have been transferred to truckdriver, rather than the laundry, and that he should have continued working until November 13, when Joseph Fromal was laid off. According to counsel for the General Counsel, Fromal, a truckdriver, worked in the same department but had less tenure than Osborne. These allegations are premised on the theory that because of Osborne's known union activity, Respondent imposed more stringent working conditions on Osborne by requiring that he have a commercial driver's license (CDL) before he could operate a truck, when such was not required for the other drivers.

Osborne distributed union leaflets where his supervisor, Calvin Mosely, observed him, and there is no dispute Osborne was an open and active supporter of the Union.

On October 19, Osborne met with Supervisor Calvin Mosely and Human Relations Manager Jack Albertson. Albertson informed Osborne that the Respondent was in a severe financial bind and he could no longer keep Osborne on the floor when there was no stock, matters which are not disputed by counsel for the General Counsel. Osborne admits that Albertson then offered Osborne the job of driving a truck. According to Osborne's undisputed testimony, however, Albertson informed Osborne that he needed a (CDL) to drive a truck.

As counsel for the General Counsel notes, Albertson and Calvin Mosely both testified at the hearing regarding Osborne, and neither rebutted Osborne's allegation that Albertson informed Osborne he had to have a CDL before he could drive a truck. I credit Osborne that Albertson said this. I also credit Albertson and Mosely, however, that Osborne stated he did not want the truckdriver position. Further, I credit both men that Osborne refused a similar position in the spring of 1995. After the meeting on October 19, Osborne was not laid off, but was transferred to the laundry department where he worked until November 3. Osborne was laid off on November 3 when he refused to work in the washroom, otherwise known as the rock room, where jeans are given a stone-washed treatment.

It is undisputed that in April 1995, when Vernell Ghee resigned, Calvin Mosely offered Ghee's job to Osborne. Osborne turned it down, and Fromal then got the job after Osborne declined it. While Osborne was unaware if truckdrivers Charles Hughes, Wayne Reese, and Joe Fromal, had a CDL, Hughes testified that he did not have such a license. Finally, it is undisputed that Fromal, who did not support the Union, continued to

work until he was laid off on November 13, while Osborne was laid off a few days earlier.

Counsel for the General Counsel's prima facie case concerning Osborne consists of the fact that he was an active and open union supporter in a facility where the Respondent engaged in numerous allegations of Section 8(a)(1) of the Act, including a threat to close the facility directed to Osborne by Mosely in early September, and where a nonunion supporting employee was kept working after Osborne was let go. While counsel for the General Counsel's position carries considerable surface appeal, certain elements are missing. Most particularly, the record fails to support a conclusion that Osborne's union activity was in any way a motivating factor in his being transferred to the laundry and/or in his being laid off in early November.

What primarily lends appeal to counsel for the General Counsel's position is the unrebutted fact Albertson told Osborne on October 19 that to be a truckdriver, Osborne needed a commercial driver's license. Why Albertson would have said that is not at all clear. If Respondent wanted to retaliate against Osborne for his union activities, it could have used that very excuse to lay off Osborne then and there. Instead, Respondent went out of its way to transfer Osborne to the laundry and keep him working. Further, while Counsel for General Counsel argues that Fromal worked slightly longer than Osborne, the credible evidence establishes that Osborne himself would have continued working if he had not refused work in the washroom. There is certainly no evidence that Respondent singled out Osborne for layoff. In fact, when Osborne was laid off from the laundry job, he was among 30 others who were also laid off. In the final analysis, I conclude counsel for the General Counsel has failed to prove that Osborne's union activity was a motivating factor either in his being transferred to the laundry and/or his later being laid off in early November. Accordingly, I shall dismiss that allegation from the complaint.

X. October 27: Layoff of Doris Boyd

Doris Boyd worked for Respondent at various times for about 13 years, with the last occasion being from 1991 until her layoff in November 1995. In early 1995, Boyd worked in the bag and tag department, where she would bag the pants to go out for orders and sometimes place the price tag on them for the retail stores. Later in 1995, she was assigned to the picking department under the supervision of Calvin Mosely. In the picking department, she would receive an order form indicating the size and quantity of pants desired and then pick the request jeans, place them on a truck, and roll them to the packers. As discussed in greater detail below, most of Boyd's orders were for J.C. Penny, Sears, and Advantage.

Boyd worked in picking with employee Deborah McKinney. Boyd and McKinney were the only two order pickers at the Chase City plant. McKinney's job was to pick "Long Haul" jeans, Respondent's own label, marketed primarily to truckdrivers. McKinney would pick selected jeans, place them in a cart, and carry them to bag and tag to have the tickets attached before being sent to packing.

It is undisputed that prior to the Board-conducted election, if Boyd or McKinley ran out of orders to pick, they were sent home if there was no work to perform in other departments. Boyd testified that she has worked on about five occasions in other departments such as bag and tag and long haul.

Boyd was an open and avid supporter of the Union. McKinney did not do anything or wear anything to work that would indicate she supported the Union.

In November, Boyd was called into the office where she was told there was not enough work for two pickers, and so she was being laid off. McKinney, who had been on medical leave for a month and not working at the time, was allowed to return to her old job.

Around Christmas, Boyd met with Calvin Mosely to inquire about work. Mosely informed Boyd that work was still slack. Mosely explained that the system for picking had been changed, and most of the orders were being packed straight out of the wash boxes to the packers stations, thereby reducing the need for the picking function she had performed. Boyd asked about working in her old department, bag and tag, but Mosely said there was not enough work.

In January 1996, Boyd again returned to Mosely, who again told Boyd that work was too slow to call her back. According to Boyd, she observed Fernanda Queensberry, supervisor in bag and tag, picking jeans out of wash boxes, as Boyd previously did for prepack orders.

Again in February I996, Boyd returned and was told for a third time that work was still slow, and she would he called back when things picked up. Boyd asserted that at no time did any supervisor offer her the chance to work an alternative work schedule or rotate with McKinney prior to being laid off. Kendall Hayes, assistant shipping manager during the fall and winter of 1995, testified credibly, however, that he and Queensberry asked Boyd about working an alternate work schedule with McKinney such as to rotate week to week, but Boyd refused.

Counsel for the General Counsel asserts that Boyd was unlawfully laid off in November and thereafter failed to be recalled in violation of Section 8(a)(1) and (3) of the Act. There is no dispute that Respondent was aware of her union sympathies. Counsel for the General Counsel argues that disparate treatment of Boyd is shown by the fact that McKinney was allowed to continue working while Boyd was laid off. Thus, counsel for the General Counsel argues it has met its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). For the following reasons, however, I find that counsel for the General Counsel has failed to establish any disparate treatment and has failed to establish that Boyd's union activity was a motivating factor in selecting Boyd for layoff.

McKinney picked "Long Haul" jeans, a men's jean that is Jonbil's own label. Because Long Hauls are made only in men's sizes, they had a wide variety of sizes, based on 1-inch variations in waist size and inseam length. Boyd picked various labels of women's jeans, which were in sizes 8, 10, 12, 14, and 16. Previously with the women's labels and currently with Long Haul, the order picker received an order for jeans. For example, a chain of stores might have placed an order for 300 pairs of jeans, with several of each size and style. The order picker would take the order, go to storage bins, take out the requested number of each size and style, and put the jeans on handtrucks. The picker would

then take the handtrucks to the packers, who would pack the jeans in boxes and send them on for shipping to the customer.

The record reflects that in 1995, before Boyd's layoff, Kendall Hayes, Calvin Mosely's assistant, decided that it would be more efficient if the bins containing women's jeans were placed near the packers so that the packers could pick and pack at the same time. This was not done with Long Haul jeans because of the greater variety of sizes. Allowing the packers to do the picking of women's jeans meant that there was less work for the pickers to do. Because Boyd was primarily responsible for picking women's jeans, her work was reduced the most.

McKinney, who had more tenure than Boyd, was on a medical leave of absence from September 27 until October 30, 1995. Hayes testified credibly that he had offered Boyd the opportunity to alternate picking Long Haul with McKinney, but Boyd declined. I also credit Hayes that he also offered to let Boyd return to belt-bag-and-tag, where she had previously worked, but she declined that offer as well. Fernanda Queensbury overheard this conversation and corroborated Hayes' testimony. Determining that there was no longer a need for two order pickers, Hayes laid Boyd off, both because McKinney picked Long Haul, which still required a picker, and because McKinney had more tenure than Boyd.

McKinney testified credibly that, in her opinion, there was not enough work for two pickers. Queensbury agreed, as did Hayes. Since Boyd was laid off, McKinney has averaged only approximately 20 hours a week. Although extra pickers are needed for some rush orders, such work can be done by the supervisors, which is precisely why Boyd may well have observed Queensbury doing some of that work when Boyd returned to the plant in January 1996. Even this "as needed" work has been drastically reduced because of combining the picking and packing functions for the women's labels. Considering all of the record evidence, I am convinced Respondent has established that Boyd was laid off solely for lack of work, and not because of her union sympathies. Counsel for the General Counsel has failed to establish that Boyd's union activities were a motivating factor in her layoff, and I shall therefore dismiss that allegation from the complaint.

Y. January 15, 1996: Layoff of April Mason

April Mason worked for Respondent on several different occasions during the past 10 years. She was most recently rehired in January 1994. Mason and Melissa Johnson operated the serge machines, placing a double lock stitch on a rough edge of fabric to keep it from unraveling. Mason and Johnson worked under the supervision of Pat Dodson.

Mason also had some experience performing certain operations on the single needle machines, a fact which is discussed in greater detail below. Before the union election, Mason would sometimes not work an entire day due to the lack of work, and sometimes she would work in other departments when there was extra work available.

Mason was an open and active supporter of the Union, a fact which was known to and is not denied by Respondent.

On January 15, 1996, Mason was laid off. She returned to work February 13, where she was first assigned to operate a single needle machine. Eventually, she was returned to the serge machine.

Counsel for the General Counsel contends that Mason's layoff was discriminatory in violation of Section 8(a)(1) and (3) of the Act because certain recently hired employees in her department continued working.

Mason does not dispute that Melissa Johnson had better production than her, and that it was logical for Respondent to keep Johnson. However, from the time of the union election until Mason was laid off, Mason observed the hiring of new employees Denise Langford and Margaret Seamens as single needle operators in Dodson's department, work which Mason had experience in doing. It is on the basis of Respondent keeping Langford and Seamans that counsel for the General Counsel argues Respondent discriminated against Mason.

Counsel for the General Counsel conveniently ignores certain important facts. Both Pat Dodson, Mason's supervisor, and Ricky Wilson, plant manager at the time of Mason's layoff, testified credibly and without contradiction that Mason was to be called back a week before she actually returned to work. Mason, however, did not have a telephone, so Dodson had to leave word with Mason's family. By the time Mason finally received the message, a week had passed in which she could have worked.

More importantly, the evidence is quite clear, and in fact not disputed, that Mason was a relatively slow worker. Dodson testified without contradiction that she brought Johnson in to help Mason in the serging work because Mason could not keep up with the work. However, once Johnson and Mason were both doing the work, they finished too early, sometimes punching out as early as 10 or 11 a.m., when their shift was supposed to end at 4:30 p.m. Dodson also testified credibly and without contradiction that her original plan was to keep Johnson in serging and reassign Mason elsewhere, but because of the slowdown in work, there was no place to reassign Mason. Accordingly, Mason was temporarily laid off.

Dodson testified that she laid off Mason and kept Johnson because Johnson was a faster and more versatile worker. Johnson agreed that her skills were more versatile than Mason's. Mason admitted that Johnson was more productive than she was. While the relative speed of Johnson and Mason is not disputed by counsel for the General Counsel, the importance of that fact is. Mason was in the serging job before Johnson, and in fact Johnson was brought in to help Mason. The fact that Johnson was kept and Mason laid off suggests that productivity, and not union sentiment, was the motivating factor.

Significantly, Johnson herself was a vocal union supporter, having passed out leaflets, worn union T-shirts, and worn stickers during the campaign. Johnson testified that everyone in the plant knew she supported the Union. However, Johnson was never laid off. Further, Mason herself admitted that many procompany employees *were* laid off.

Margaret Seamans and Denise Langford sewed Calvin Klein labels on that brand of jeans, which was a different type of work than Mason was doing. While Mason had performed some single needle work, Dodson testified without contradiction that Mason could not do the Calvin Klein label work because she was too slow. Mason herself made no claim to having sewn on labels and admitted she could not name a specific job that she could have been assigned to during the time of her layoff.

Mason testified that, even after the election, when work was slow, she would sometimes be assigned elsewhere. Respondent, however, was aware of her union sympathies as early as the summer of 1995. There is no question that at earlier times when Respondent had plenty of chances to release Mason, it kept her in spite of her known union sentiments. Mason admitted that there was no new union-related activity around January 1996 that might have motivated the company to take discriminatory action.

Considering all of the record evidence, I am convinced Respondent has established that Mason was selected for layoff solely because of relative productivity, and not because of her union sympathies. Careful analysis of counsel for the General Counsel's position regarding each of the alleged violations of Section 8(a)(3) of the Act in this case reflects that it is founded on an unspoken, implied argument that unless Respondent accorded union activists departmental seniority in layoff situations, it therefore discriminated against them in violation of the Act. There is no evidence, however, that Respondent utilized seniority in making any of its layoff decisions *except* where two people occupied the same position within the same department. Because of this implied, yet unspoken argument, counsel for the General Counsel has repeatedly failed to show actual disparate treatment afforded the alleged discriminatees. As it relates to Mason, I find counsel for the General Counsel has failed to establish that Mason's union activities was a motivating factor in her layoff, and I shall therefore dismiss that allegation from the complaint.

Z. February 1996: Failure to Recall Charles Hughes

Charles Hughes worked for Respondent 5 years until he was laid off on February 12, 1996, from the shipping and receiving department.

In early 1995, Respondent had three truckdrivers: Wayne Reese, Hughes, and Vernell Ghee, in order of relative tenure. Ghee resigned in April 1995, and the position was filled by Joseph Fromal, who is referred to in the transcript as "Joe Farmer." Hughes was a "long haul" driver, driving to and from Respondent's plant in Henderson, North Carolina. When Respondent closed its Danville, Virginia facility in August 1995, Supervisor Calvin Mosely assigned Reese to the Henderson route and assigned Hughes to the local Chase City route, driving a truck with materials and finished goods from the bottom plant to the top plant and making stops at the area landfill. Fromal was assigned as Hughes' helper.

During the union campaign, Hughes distributed union leaflets at the parking lot on several occasions, where Supervisor Calvin Mosely observed him. Hughes was an open and active supporter of the Union, a fact which Respondent does not deny.

Fromal was laid off for lack of work on November 13, 1995, and his layoff became permanent on December 5. Thereafter, Fromal was reinstated/rehired to a position in the laundry department on second shift on January 15, 1996. He later changed to first shift on February 8.

When the Henderson facility closed in February 1996, there was no need for two drivers. Reese and Hughes occupied the same position in the same department, and because Reese was more senior than Hughes, Hughes was laid off effective February 9, 1996. Approximately 15 other employees were laid off around the same time.

On February 9, Calvin Mosely met with Hughes and told Hughes he was being laid off. The payroll change notice documenting Hughes' layoff states that Calvin Mosely "would" rehire Hughes. It is undisputed Mosely informed Hughes that he would set up an appointment with Human Resources Director Jack Albertson to talk about other possible positions in the plant. It is also undisputed that Mosely never set up the appointment for Hughes to talk to Albertson. Albertson testified credibly that Mosely did speak to him about this, but according to Albertson, nothing was ever set up with Hughes because there were no positions available.

At about the same time as Hughes' layoff, Fromal was allowed to transfer from second shift to first shift in the laundry. Counsel for the General Counsel argues that Hughes should have been offered this first-shift laundry position because Hughes had more tenure than Fromal, or, that at the very least, this transfer should have created a position on second shift in the laundry, where Hughes previously worked before becoming a truckdriver. Counsel for the General Counsel argues that work remained available there, at least for a matter of weeks after Hughes was laid off.

Laundry Manager John Reese testified without contradiction that Fromal was not the only second-shift employee from the laundry allowed to transfer to first shift. Several employees transferred at the same time, and all in anticipation of the second shift being phased out. Reese testified credibly that none of the people who transferred were replaced because phasing out of the second shift was already under way.

In counsel for the General Counsel's posttrial brief, he "avers that while Hughes' layoff was lawful," the failure to recall Hughes to or transfer Hughes to the laundry department was unlawful. Counsel for the General Counsel argues that when Fromal was transferred to first shift in the laundry, that position should have been offered to Hughes, and when it was not, Respondent discriminated against Hughes in violation of Section 8(a)(1) and (3) of the Act. I cannot agree with counsel for the General Counsel, whose argument effectively mandates not just departmental seniority, but plant wide seniority if Respondent is to avoid an inference that it discriminated against Hughes.

As before, analysis of counsel for the General Counsel's position regarding each of the alleged violations of Section 8(a)(3) of the Act in this case reflects that it is founded on an unspoken, implied argument that unless Respondent accorded union activists departmental seniority—or in Hughes' case plantwide seniority—in layoff situations, it therefore discriminated against them in violation of the Act. There is no evidence, however, that Respondent utilized seniority in making any of its layoff decisions unless two people occupied the same position within the same department. Precisely because of that limited use of seniority, Hughes, the union supporter, was kept working when Fromal, not a union supporter, was laid off in November 1995.

Counsel for the General Counsel has repeatedly relied on this implied, yet unspoken argument requiring the using of departmental or even plant wide seniority, and in doing so has repeatedly failed to show actual disparate treatment afforded the alleged discriminatees. As it relates to Hughes, I find counsel for the General Counsel has failed to establish that Hughes' union

activities was a motivating factor in his layoff, and I shall therefore dismiss that allegation from the complaint.

The Bargaining Order Remedy

The complaint alleges and Respondent admits that the following unit is appropriate for purposes of collective bargaining:

> All production and maintenance employees employed by the Respondent at its Chase City, Virginia, facilities; excluding all office clerical employees, guards, and supervisors as defined in the Act.

The "*Excelsior* list" used in the Board-conducted election contains the names of 198 employees who worked at the "bottom plant" and the names of 121 employees who worked at the "top plant." Six challenged ballots were stipulated to be ineligible to vote, and only one challenged ballot remains. Therefore, at most there are 314 unit employees.

Four union representatives, Harold Bock, David Greenlief, Mark Wilkerson, and David Sailer, testified without contradiction about soliciting Jonbil employees to sign union authorization cards. The union representatives read to or the potential card signer read the union authorization card prior to signing it. The employees are bound by the clear language of the card. See *DTR Industries,* 311 NLRB 833, 838 (1993). At no time did they ever inform a Jonbil employee that the sole purpose of the union authorization card was "only" to get an election.

Harold Bock, assistant regional director for the Union who had participated in about 30 union organizing campaigns, testified concerning 20 union authorization cards that he personally solicited and that he observed the employees sign. Several of the card signers Bock solicited also signed the union sign-in sheets for the July 16 and 17 union meetings.

David Greenlief, another union representative, testified without contradiction regarding 23 authorization cards he personally solicited and observed the employee sign. Greenlief received other signed cards from employees at the two union meetings, but did not see those employees actually sign their cards. A comparison of all such card signatures against the sign in sheets and the available W-4 forms shows that they are authentic. The Board has long held that expert testimony is not required to prove the validity of the signatures on union authorization cards and has specifically approved the use of W-4 for signature comparisons. See *Be-Lo*, supra; *Action Auto Stores*, 298 NLRB 875, 879 (1990), enfd. mem. 951 F.2d 349 (6th Cir. 1991).

Mark Wilkerson, a third representative of the Union, solicited 11 employees personally. In addition, counsel for the General Counsel introduced W-4 forms for the remainder of the cards solicited by Wilkerson, and a comparison of the W-4 forms and the sign in lists indicate that the same person signed both documents.

The remaining authorization cards were introduced and received into evidence via the actual card signer, or on a few occasions, the actual card signer authenticated his/her signature after the card had been received into evidence via the solicitor. The record reflects that on August 5, the date used for the "*Excelsior* list," the Union had obtained 182 valid union authorization cards, and as of that date enjoyed majority status.

I have dismissed many of the complaint allegations, including all of the allegations that Respondent discriminated against various individuals in violation of Section 8(a)(3) of the Act. Nevertheless, I have found Respondent has committed numerous unfair labor practices before the election, which are generally considered "egregious" and so serious and substantial in character that the possibility of conducting a fair rerun election by use of traditional remedies is slight, at best. I have found that in speeches to employees, both as soon as Respondent learned of union activity and as late as the day before the Board-conducted election, Respondent's top management officials threatened employees with plant closure if employees selected the Union to represent them. In similar circumstances, the Board has generally held that employees would be best protected by the issuance of a bargaining order.

In determining whether a bargaining order is appropriate to protect employees sentiments and to remedy an employer's misconduct, the Board examines the nature and persuasiveness of the employer's practices. In weighing a violation's persuasiveness, relevant considerations include the number of employees directly affected by the violation, the size of the unit, the extent of dissemination among the work force, and the identity of the perpetrator of the unfair labor practices. *Holly Farms*, 311 NLRB 273 (1993).

In the current case, Respondent's highest ranking onsite official, Tom Smith, on learning of union activity, conducted meetings with nearly all of the employees wherein he threatened employees with plant closure. Following his lead, various supervisors began to talk to employees and threatened them with plant closure and job loss. As the Board stated in *General Stencils, Inc.,* 195 NLRB 1109, 1110 (1972), threats of loss of employment and plant closure are especially repugnant to the purposes of the Act and are inevitably going to be discussed among employees. The record here reflects that the day before the election, Herbert Winkler, the majority owner of Jonbil, met with the vast majority of employees and repeated these same threats of plant closure and job loss.

The Board has held that conduct of the type engaged in here warrants the issuance of a bargaining order. See *Be-Lo*, supra; *Holly Farms*, supra; *Lasar Tool, Inc.*, 320 NLRB 105 (1995). In *Salvation Army Residence*, 293 NLRB 944 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990), the Board found a bargaining order an appropriate remedy to numerous 8(a)(1) violations, and noted:

> In view of the serious misconduct the Respondent has engaged in, and particularly the threats of closure of the facility directed at the entire unit, we are convinced that the coercive impact on the employees has not dissipated, and in any event we are convinced that the misconduct is likely to recur. . . . Requiring the Respondent simply to refrain from such conduct will not eradicate the lingering effects of the violations. [Id. at 945–946.]

Respondent contends that a second election is the appropriate remedy in this matter, partly because turnover within the unit has reduced the impact of any violations of the Act which may have occurred. There are 115 employees listed on the

"*Excelsior* list" that have been terminated or permanently laid off and not recalled. Hence, there has been approximately a 37-percent (115 of 314) turnover in employees since the election. In addition, there are nine other employees who have since been hired and not terminated or permanently laid off. Thus, the total turnover in bargaining unit employees is 124, which is 39 percent of the 314 complement of bargaining unit employees. As counsel for the General Counsel argues, the Board has issued *Gissel* bargaining orders in cases of even higher turnover than the instant case. See *Be-Lo*, supra, 15 (bargaining order found valid where new employees constituted two-thirds of the work force); *Action Auto Stores*, supra at fn. 3 (bargaining order found valid where new employees constituted three-fourths of the work force); *Salvation Army*, supra at 946 (bargaining order valid where new employees constituted two-thirds of the work force).

Accordingly, I find sufficient precedent that a bargaining order is the appropriate remedy for the unfair labor practices found herein, and I shall order that Respondent be required to recognize and bargain with the Union as the exclusive representative of employees in the appropriate unit.

CONCLUSIONS OF LAW

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. On or about July 17, Respondent, acting through Thomas Smith threatened plant closure if employees chose to exercise their rights protected by the Act, and Respondent thereby violated Section 8(a)(1) of the Act.

4. On or about August 8, Respondent, acting through Supervisor Barbara Stenbridge, interrogated an employee, solicited grievances from that employee, and expressly or impliedly promised to remedy those grievances in violation of Section 8(a)(1) of the Act.

5. On or about August 18, Respondent, acting through Supervisor Barbara McCluster, threatened an employee with plant closure if employees chose to exercise their rights protected by the Act, and Respondent thereby violated Section 8(a)(1) of the Act.

6. On or about August 18, Respondent, acting through Supervisor Rosa Mosely, threatened employees with plant closure if they selected the Union to represent them, and Respondent thereby violated Section 8(a)(1) of the Act.

7. On or about August 18, Respondent, acting through Fred Moore, threatened employees with loss of benefits in violation of Section 8(a)(1) of the Act.

8. In late August, Respondent, acting through Supervisor Rosa Mosely, threatened employees with loss of benefits if they selected the Union to represent them, and Respondent thereby violated Section 8(a)(1) of the Act.

9. In late August to mid-September, Respondent, acting through Supervisor Rosa Mosely, threatened employees with plant closure, the inevitability of strikes, and the futility of employees selecting the Union to represent them, and Respondent thereby violated Section 8(a)(1) of the Act.

10. On or about September 5, Respondent, acting through Supervisor Calvin Mosely, threatened employees with plant closure if they selected the Union to represent them, and Respondent thereby violated Section 8(a)(1) of the Act.

11. On or about September 13, Respondent, acting through Supervisor Rosa Mosely, threatened employees with plant closure if they selected the Union to represent them, and Respondent thereby violated Section 8(a)(1) of the Act.

12. On or about September 14, Respondent, acting through Herbert Winkler, threatened employees with plant closure if they selected the Union to represent them, and Respondent thereby violated Section 8(a)(1) of the Act.

13. On or about September 14, Respondent, acting through Supervisor John Reese, threatened employees with loss of jobs if they selected the Union to represent them, and Respondent thereby violated Section 8(a)(1) of the Act.

14. Respondent did not otherwise violate the Act and other complaint allegations are dismissed as more specifically discussed above.

15. The following unit is appropriate for purposes of collective bargaining:

> All production and maintenance employees employed by the Respondent at its Chase City, Virginia, facilities; excluding all office clerical employees, guards, and supervisors as defined in the Act.

16. On August 5, the date used for the "*Excelsior* list," the Union had obtained 182 valid union authorization cards, and as of that date enjoyed majority status.

17. Respondent has committed numerous and egregious unfair labor practices before the election, which are so serious and substantial in character that the possibility of conducting a fair rerun election by use of traditional remedies is slight, at best. Accordingly, a bargaining order is the appropriate remedy for the unfair labor practices found herein, and Respondent shall be required to recognize and bargain with the Union as the exclusive representative of employees in the appropriate unit.

18. The unfair labor practices which Respondent has been found to have engaged in have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]